No. 82577-7

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU LOCAL 925,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF ITS PETITION FOR A PEREMPTORY WRIT OF MANDAMUS AGAINST GOVERNOR CHRISTINE GREGOIRE

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I. INTRODUCTION

Petitioner SEIU Local 925 ("Union" or "Local 925") brings this original action in mandamus to compel the Governor to fulfill a mandatory and completely nondiscretionary duty.

Local 925 represents approximately 9,000 family child care providers ("FCCP") who, solely for the purposes of collective bargaining, are considered employees of the State. Pursuant to the collective bargaining statute, the parties submitted their unresolved issues to interest arbitration and received a timely opinion and award on August 25, 2008. Despite plain and unambiguous language in the statute, the Governor excluded from the biennial budget she submitted to the Legislature a funding request for the providers' 2009-2011 CBA.

By excluding the FCCP contract from her budget, the Governor failed to perform a mandatory and completely nondiscretionary act prescribed by statute: The Access to Quality Family Child Care Act ("Family Child Care Act"), RCW 41.56.028, requires that "the governor must submit... a request for funds necessary to implement the compensation and benefit provisions of" the family child care providers contract, provided that two preconditions are met. RCW 41.56.028(5) (emphasis added).

First, the interest arbitrator's award, along with the contract provisions negotiated by the parties without arbitration, must be submitted to the director of the Governor's office of financial management (OFM) before October 1. Second, the request must either have been certified by OFM as being "feasible financially" for the state, or "reflects the binding decision of an arbitration panel reached under this section." RCW 41.56.028(6)(b). It is undisputed that both statutory preconditions were met.

Yet despite both of these prerequisites being met, the Governor failed to fulfill her statutory obligation to seek funding for the family child care provider contract. This failure to act unravels the statutory bargaining process the parties assiduously followed, and Local 925 relied upon. The Governor is the only official mandated to act upon the interest arbitration award.

The Governor's failure to request funding for the 2009-2011 contract deprives Local 925 and its members of their rights under statute, and greatly reduces the likelihood that the Legislature will fund the contract, which ultimately deprives 9,000 low wage FCCPs of the increases and improvements they fought for and won in interest arbitration.

Local 925 petitions for a writ of mandamus ordering the Governor to immediately withdraw her current budget request and submit a revised

biennial budget that includes funding for the FCCP 2009-2011 contract. The regular legislative session commenced on January 12, 2009 and concludes on April 26. The Union seeks this extraordinary writ as it has no effective, adequate or speedy remedy at law.

II. STATEMENT OF ISSUE

Should this Court issue a writ of mandamus ordering Governor Christine Gregoire to immediately withdraw her current budget request and submit a revised 2009-2011 biennial budget request to the Legislature that includes a request for funds necessary to implement the compensation and benefit provisions of the collective bargaining agreement between SEIU Local 925 and the State, entered into under the Access to Quality Family Child Care Act, RCW 41.56.028?

III. STATEMENT OF CASE

A. Family Child Care Providers

To support working parents, the State funds various programs that assist qualifying families in paying for child care services.[1] Like private pay families, many parents receiving child care assistance from the state choose family child care providers as an alternative to a child care center.

[1] See generally, Joint Ex.9 at 7 (Interest Arbitrator's Decision & Award, Cavanaugh, 2008)(describing mix of federal and state funds used to subsidize child care as part of larger policy of encouraging low income and working parents to enter and remain in the workforce), and Ex. 10 (Tentative 2009-2011 CBA) Preamble.

The Family Child Care Act designates the Governor as the FCCPs' public employer, solely for the purpose of collective bargaining. RCW 41.56.028(1). "The designation of the Governor as the statutory 'employer' reflects an economic reality, i.e. although subsidized families are entitled to choose the care setting in which to enroll their children, the bulk of the compensation for that care comes from the State, not the parents." Joint Ex. 9[2] at 5-6 (Cavanaugh Award).

Local 925 represents both Licensed and License-Exempt providers, meaning those who are licensed by the Department of Early Learning, and those who are exempt from such licensing. Joint Ex. 10 at 1 (Article I). Although regulated by the Department of Early Learning, FCCPs typically operate small child care businesses out of their own home. Joint Ex. 9, n. 9; declaration of Karen Hart, ¶ 2. The Union contract with the State covers those FCCPs providing care to children whose families are eligible to receive state support for the costs of child care, i.e., state-paid children. Hart Decl. ¶ 3; Joint Ex. 9 at 5 ("Any Licensed Home or Exempt provider caring for at least one subsidized child during the course of a year is included in the bargaining unit, RCW 41.56.030(12)").

[2] "Joint" refers to those exhibits accompanying the Agreed Statement of Facts.

B. Collective Bargaining Framework and Interest Arbitration

The Legislature enacted the Family Child Care Act in 2006, and amended it in 2007; it is now codified at RCW 41.56.028. This established a statewide collective bargaining system for FCCPs. Providers covered by this law are considered public employees solely for collective bargaining purposes. RCW 41.56.028(1). The Family Child Care Act authorized a statewide bargaining unit as the only appropriate unit for purposes of union representation. Local 925 "was certified as the bargaining representative of the providers in 2006 pursuant to an election[.]"Joint Ex. 9 at 2.

By enacting the Family Child Care Act the Legislature directed that "[e]conomic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; [and] health and welfare benefits" for child care providers are determined through collective bargaining. RCW 41.56.028(2)(c). The "parties bargained an initial collective bargaining agreement [in 2006] covering the period July 1, 2007 through June 30, 2009, a period coextensive with the State's 2007-2009 biennium." Joint Ex. 9 at 2; Agreed Statement of Facts ("ASF"), ¶ 6. Funding to implement the 2007-2009 FCCP contract was included in the

Governor's budget document, which was submitted to, and approved by, the Legislature for the 2007 session. ASF, ¶ 6.

In 2008, the parties dutifully met from January through July and successfully negotiated nearly all of the Articles that now comprise the parties' tentative CBA.[3] Joint Ex. 2 (Timeline). The parties identified seven issues they were unable to resolve, joint Ex. 1 (July 28, 2008 letter from PERC to parties), yet ultimately, the parties presented only two issues for interested arbitration. Joint Ex. 9 at 9.

RCW 41.56.028(2)(d) provides for interest arbitration in the event the parties are unable to successfully negotiate a labor agreement. In interest arbitration, a neutral third party determines substantive terms of the new labor agreement. ASF, ¶ 5. In 2007, the Legislature amended the Family Child Care Act and enacted specific criteria for an arbitrator to apply when evaluating competing proposals. Laws of 2007, Ch. 278. Specifically, RCW 41.56.465(4)(a) states the arbitrator "shall" consider (i) comparable subsidy rates paid to family child care providers by public entities on the west coast; and (ii) the "financial ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement." *See* Joint Ex. 9 at 8-9 (overview of arbitrator's criteria).

[3] See Joint Ex. 10, 2009-2022 Tentative Collective Bargaining Agreement.

The state presented extensive evidence regarding the state's "financial ability." ASF, ¶ 7, a-d. The interest arbitrator devoted considerable attention to the State's financial condition and was acutely aware of the projected revenue shortfalls. Joint Ex. 9 at 28-34. "Facing a revenue shortfall approaching $3 Billion during the next biennium, the State simply cannot afford the increased subsidy rates proposed by the Union." Joint Ex. 9 at 30. In his award, Arbitrator Cavanaugh placed great weight on the State's projected economic situation, while acknowledging the importance of early childhood learning.

> Turning to ability to pay, then, I must take into account the projected financial condition of the State... At the same time, I must also keep in mind the priority the State has placed on early childhood care and learning, while not forgetting that many other worthy programs and workers will be clamoring for their "fair share" of a pot of revenue that will very likely turn out to be much smaller than might have been anticipated a year or so ago.
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> ***
>
> ...it would be foolish of the State (and of an interest arbitrator) to award expensive contract improvements based on little more than a hope that actual future revenue will, in fact, turn out to be substantially greater than forecast. Moreover, the Governor and the Legislature are required by law to present a budget in balance with a forecast of revenues that will be produced later in the year, and while it is possible that economic conditions will change sufficiently between now and then to reduce the current projection of a $2.7 Billion shortfall, ... the forecast in June 2008 was lower than the forecast in February 2008,...and

> recent monthly collections of revenue seem to confirm a trend that is worsening, not yet getting better.

Joint Ex. 9 at 28-29. Arbitrator Cavanaugh ultimately issued an economic award that closely resembled the State's proposed subsidy rates.

Notwithstanding Arbitrator Cavanaugh's careful consideration of the statutory criteria, including the state's ability to pay, his award included modest economic improvements and benefits for the FCCPs. Although rejecting the Union's rate proposal, the Arbitrator awarded a 1.6% across the board subsidy rate increases for the first year of the 2009-2011 CBA for both Licensed and License-Exempt providers. He awarded a 2% increase for the second year. (The state had proposed 1.6% for both years, while the Union sought 7.8% increases for each year). He also adopted a revised version of the Union's enhanced toddler rate proposal. Joint Ex. 9 at 22.

C. The Governor Failed to Request Funding for the 2009-2011 Family Child Care Provider Contract.

RCW 41.56.028(5) provides that the Governor **must submit,** as part of the proposed biennial operating budget she submits to the legislature, "a request for funds necessary to implement the compensation and benefit provisions of a collective bargaining agreement entered into under this section or for legislation necessary to implement such agreement." The provision RCW 41.56.028(5) reads, in full:

> Upon meeting the requirements of subsection (6) of this section, the governor must submit, as a part of the proposed biennial or supplemental operating budget submitted to the legislature under RCW 43.88.030, a request for funds necessary to implement the compensation and benefit provisions of a collective bargaining agreement entered into under this section or for legislation necessary to implement such agreement.

Subsection (6) of RCW 41.56.028, referenced in the previous paragraph, identifies only two preconditions for the mandatory submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of the collective bargaining agreement entered into under RCW 41.56.028. First, the request must previously have been submitted to the director of the Office of Financial Management ("OFM") by October 1st prior to the legislative session at which the request is to be considered. RCW 41.56.028(6)(a). That requirement was met. ASF, ¶ 8. Second, the request must have either been certified by the director of financial management as being feasible financially for the state or must reflect the binding decision of an arbitration panel reached under this section. RCW 41.56.028(6)(b). There is no dispute that the Cavanaugh Award, Joint Ex. 9, constitutes a "binding decision" under RCW 41.56.028(6)(b).

On December 18, 2008 the same day the Governor submitted her proposed biennial budget to the legislature, ASF, ¶16, OFM's Labor

Relations Office issued a letter along with a December 17, 2008 memorandum from the OFM director, to Local 925, and to other unions with State contracts, announcing that the Governor was not submitting to the Legislature a request for funds necessary to implement the compensation and benefit provisions of the State's CBAs, including the interest arbitration awards. Joint Exs. 14 & 15. The decision reflected OFM's determination that the awards and CBAs were "not feasible financially for the state." Joint Ex. 14 at 2. It drew no distinction between arbitrated and negotiated contracts.[4] The letter also announced that legislation "will be submitted" to change the current statute and make arbitration awards subject to certification by OFM as to their financial feasibility. Joint Ex. 15.

Under the Family Child Care Act, the Legislature "must approve or reject the submission of the request for funds as a whole. If the legislature rejects or fails to act on the submission, any such agreement will be reopened solely for the purpose of renegotiating the funds necessary to implement the agreement." RCW 41.56.028(7). The legislative session commenced on January 12. The last day allowed the under the Washington Constitution for the 2009 regular legislative session is April 26. *See* Const. art. II, § 12.

[4] Only certain public sector employees have the statutory right to settle their contracts through interest arbitration. *See* Ex. 14 at 3 (Bates# 0444)

IV. ARGUMENT

A. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS SINCE GOVERNOR GREGOIRE IS UNDER A CLEAR DUTY TO ACT, THE UNION HAS NO PLAIN SPEEDY AND ADEQUATE REMEDY AT LAW, AND THE UNION IS BENEFICIALLY INTERESTED.

"The supreme court shall have original jurisdiction in ...mandamus as to all state officers..." Const. art IV, § 4; *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). The statutory framework set forth in RCW 7.16.150 - .280 requires the applicant for a writ of mandamus to satisfy three elements before the writ will properly issue: 1) the party subject to the writ is under a clear duty to act; 2) the applicant has no plain, speedy and adequate remedy in the ordinary course of law; and 3) the applicant is beneficially interested. RCW 7.16.160-170; *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *rev. denied,* 151 Wn.2d 1027, 94 P.3d 959.

"Mandamus is appropriate to compel a government official or entity to 'comply with law when the claim is clear and there is a duty to act.'" *Eugster,* 118 Wn. App. at 404 (quoting *In re Pers. Restraint of Dyer*, 143 Wash.2d 384, 398, 20 P.3d 907 (2001), citing *Walker v. Munro*, 124 Wash.2d 402); *Wash. State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 115 P.3d 301 (2005) (stating that a writ properly issues to compel the

performance of an act or duty expressly required by law); *Land Title of Walla Walla, Inc. v. Martin*, 117 Wn. App. 286, 289, 70 P.3d 978 (2003) (finding mandamus appropriate to compel a state official to comply with a law when the claim is clear and a duty to act exists).

"Mandamus does not authorize a court 'to assume general control or direction of official acts.'" *Eugster, supra* at 404 (quoting *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490 (1940); *see also Walker*, 124 Wn.2d at 407, 879 P.2d 920). "Instead, the remedy of mandamus contemplates the necessity of indicating the precise thing to be done." *Id.* (quoting, *Walker*, 124 Wn.2d at 407)(citation omitted)

"The duty to be enforced by mandamus must be one which exists at the time when the application for the writ is made." *Walker,* 124 Wn.2d at 409. Review of the statutory scheme for FCCP collective bargaining establishes that at the time Governor Gregoire presented her biennial budget to the legislature, RCW 41.56.028 imposed a clear mandatory duty that she request funding for the FCCP contract.

1. Governor Gregoire Has A Clear Duty To Act Since RCW 41.56.028(5) Uses Unambiguous Mandatory Language To Require The Governor To Include Funding For The Family Child Care Providers' Contract In Her 2009-2011 Biennial Budget.

A. RCW 41.56.028(5)'s provision, "the governor must submit," creates a mandatory duty to act.

As was explained above, RCW 41.56.028(5) provides that "[u]pon meeting the requirements of subsection (6) of this section," RCW 41.56.028(6), "the governor must submit" a request for funds necessary "to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under this section..." (emphasis added).

When interpreting a statute, the court first looks to its plain language and, if the plain language is subject to only one interpretation, the inquiry is over. *In re Detention of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). When clear and unequivocal language is at issue, courts must assume that the legislature meant exactly what it said, apply the statute as written and decline to construe the statute otherwise. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005); *Burton v. Lehman*, 153 Wn.2d

416, 424, 103 P.2d 1230 (2005); *Diehl v. Western Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 214, 103 P.3d 193 (2004).

Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen*, 162 Wn.2d at 373; *see also, Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). The ordinary, everyday meaning should be given to words not particularly defined. *Prison Legal News v. Dep't of Corrections*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005).

In this case, the "plain meaning" of the statutory language "the governor must submit" is not merely permissive; it creates a mandatory obligation or duty to act. That is because the words "shall" and "must" are generally considered synonyms,[5] and the word "shall" is consistently construed as mandatory and operating to create a duty. *See, e.g., Philadelphia II v. Gregoire,* 128 Wn.2d 707, 713, 911 P.2d 389 (1996) (finding "shall" is presumptively imperative unless contrary legislative intent is apparent); *Waste Mgmt. of Seattle, Inc. v. Utilities and Transp.*

[5] *See, e.g., Buell v. City of Toppenish*, 174 Wn. 79, 80, 24 P.2d 431 (1933) (using "shall" and "must" to indicate a mandatory duty); *Tranen v. Aziz,* 59 Md. App. 528, 534-35, 476 A.2d 1170 (1984) (finding that, unless the context indicates otherwise, "shall" and "must" will be construed synonymously to foreclose discretion and impose a positive absolute duty).

Comm'n, 123 Wn.2d 621, 869 P.2d 1034 (1994); *Emwright v. King County*, 96 Wn.2d 538, 544, 637 P.2d 656 (1981).

Using the word "must" similarly creates a mandatory statutory requirement, which a court "cannot rewrite or modify...under the guise of statutory interpretation or construction." *Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994) (referring to a Pierce County Code provision requiring the filing of an appeal notice and fee).

Based on these fundamental rules of statutory interpretation, the plain language of the statute must be assigned its proper meaning - as long as the prerequisites set forth in RCW 41.56.028(6) were met, the Governor was obligated to submit a request to fund the 2009-2011 FCCP contract as determined by Arbitrator Cavanaugh's interest arbitration award.

B. Both prerequisites under RCW 41.56.028(6) were satisfied.

As was noted above, RCW 41.56.028(5) references only two prerequisites for imposition of the duty on the Governor to submit a request for funds necessary to implement a collective bargaining agreement entered into under RCW 41.56.028. The language of this provision states, in pertinent part, that the request for funds necessary to

implement the contract "shall not be submitted" unless the request has been:

> (a) Submitted to the director of financial management by October 1st before the legislative session at which the request is to be considered...; and
>
> (b) Certified by the director of financial management as being feasible financially for the state or reflects the binding decision of an arbitration panel reached under this section.

RCW 41.56.028(6) (emphasis added)

Therefore, the request first must previously have been submitted to the OFM by October 1st prior to the legislative session at which the request is to be considered. There is no dispute that this prerequisite to the applicability of RCW 41.56.028(6)(a) occurred in the instant case. *See* ASF ¶ 8.

Second, based on the foregoing language, the request must have **either** been certified by OFM as being feasible financially for the state, **or** must reflect the binding decision of an arbitration panel reached under RCW 41.56.028. As was discussed above, the second of these two alternative means of satisfying the second prerequisite (-.028(6)(b)) occurred because Arbitrator Cavanaugh issued his interest arbitration decision well in advance of October 1, 2008. *See* ASF ¶ 8; Ex. 9.

Thus, both statutory prerequisites referenced in RCW 41.56.028(5) were satisfied, leaving the Governor no choice but to comply with the mandatory language of that statute.

C. The State's arguments regarding the need for OFM certification of the financial feasibility of an interest arbitration award are without merit.

The State apparently contends that even where an arbitration decision has been issued under RCW 41.56.028, the Governor is not obligated to include a request to fund the collective bargaining agreement absent a finding of financial feasibility from OFM. However, the rules of statutory interpretation noted above, which require that the plain language of a statute be given effect, requires the opposite conclusion. That is because the plain language of this statute, by using the word "or," clearly and unequivocally indicates that the prerequisite set forth in RCW 41.56.028(6) is satisfied **either** by a certification of financial feasibility by OFM, **or** by a binding decision of an arbitration panel reached under RCW 41.56.028(2)(d).

As a default rule, the word "or" cannot mean "and" unless legislative intent clearly indicates to the contrary. *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (Fairhurst, J., with three justices concurring and one justice

concurring in result) (finding "or" not susceptible to multiple reasonable interpretations and refusing to strain to read "or" as "and"); *HJS Dev. Inc., v. Pierce County,* 148 Wn.2d 451, 474, n.95, 61 P.3d 1141 (2003). Without clear legislative intent to the contrary, courts logically presume "or" is used disjunctively (i.e. in the alternative) in a statute. *State v. Bolar,* 129 Wn.2d 361, 365-66, 917 P.3d 125 (1996).[6]

Nothing in RCW 41.56.028(6) indicates any legislative intent that "or" should be read conjunctively to mean "and." On the contrary, the construction of the statute shows very clearly the when the Legislature wanted multiple items to be read conjunctively it knew specifically how to do so.

For example, RCW 41.56.028(6)(a) and (b) are individually lettered and separated by the word "and." This construction indicates that the governor shall not submit a request for funds to the legislature unless the provisions of both (a) (the October 1 deadline) and (b) (OFM certification or arbitration award) have been met.

In contrast, RCW 41.56.028(6) establishes two alternative ways that the requirement of subsection (b) may be met: the governor's budget request is certified by OFM as being financially feasible for the state "or"

[6] In contrast, statutory phrases separated by the word "and" generally should be construed in the conjunctive (i.e. as requiring co-existence). *Bolar,* 129 Wn.2d at 365-366 (quoting *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978)); *HJS Dev. Inc.*, 148 Wn.2d at 474, n.95.

the request reflects the binding decision of an arbitration panel. RCW 41.56.028(6)(b). Had the legislative intent been to require OFM certification even where the contract reflects the binding decision of an arbitration panel, those two requirements would have been separated by the word "and," not the word "or." The State cannot plausibly argue to the contrary.

In fact, the State, through OFM, has all but conceded that under RCW 41.56.028(6)(b) no certification of financial feasibility from the director of OFM is required or authorized with regard to the binding decisions of an arbitration panel. In a letter dated December 18, 2008, OFM stated, *inter alia*, that "[l]egislation will be submitted along with the Governor's 2009-2011 proposed budget that **subjects arbitration awards to be certified as feasible financially** for the state by the director, Office of Financial Management," ASF Ex. 15 (emphasis added). By so stating, OFM acknowledged that absent such legislation, arbitration awards need not be so certified. Why else would such legislation be sought?

The OFM's representative at the interest arbitration hearing for the individual providers, (represented by SEIU Healthcare 775NW), Mr. Opitz, also conceded, in his testimony at that hearing, that the results reached through interest arbitration would **inevitably** be included, as a

"legal mandate," in the Governor's 2009-2011 proposed budget. Mr. Opitz testified:

> So the policy choice is going to be made in this room to place **a legal mandate in front of the Governor and Legislature** to pay for something that then crowds out something else, and the rest of the policy choices are about what's crowded out.... [I]n balancing our budget in December [2008], we incorporate what the award is, and it goes to the top of the -- top of the list. It -- it -- it's funded as if it were a contractual obligation within our budget deliberations and crowds out something else."

SEIU 775 v. Gregoire, No. 82551-3, ASF Ex. 4, pg. 626:2-8 (emphasis added).[7]

RCW 41.56.028(6)(b), in referring to "the binding decision of an arbitration panel reached under this section," is referencing the outcome of the interest arbitration process set forth in RCW 41.56.430 through RCW 41.56.480. RCW 41.56.028(2)(d). The pertinent statutory provision, RCW 41.56.465, which addresses FCCP bargaining specifically, explicitly requires the interest arbitrator to consider "[t]he financial ability of the state to pay for the compensation and fringe benefit provisions of a collective bargaining agreement." RCW 41.56.465(4)(a)(ii).[8]

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[7] Mr. Opitz's statement also reveals that the State fully believed that its ability to pay would be determined by the Arbitrator – that the "policy choice is going to be made in this room." *Id.*

[8] Consistent with this statute, as was noted above, Arbitrator Cavanaugh did, in fact, explicitly and strongly consider the financial ability of the state to pay for the compensation and fringe benefit provisions of his interest award, and adjusted his award significantly in light of that consideration.

Because the interest arbitrator is legally required to consider the financial feasibility of the arbitration award he or she issues, he or she serves the same (and sole) role, with regard to agreements that are reached through interest arbitration, as that played by OFM with regard to certifying the financial feasibility of bargained agreements. RCW 41.56.028(6)(b) therefore creates two methods of ensuring the financial feasibility of contracts – one for bargained agreements, which must be certified by OFM, and one for interest arbitration awards, which must pass muster with the interest arbitrator.

While the State may now wish to change this statutory framework, it cannot plausibly contend that Petitioner's interpretation is outside the realm of reasonableness so as to require this Court to decide that the words used in the statute cannot mean what they very clearly say, and to deny the writ on that basis.

2. Petitioner Has No Plain, Speedy, And Adequate Remedy At Law.

"The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170. "A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights

of the litigants will not be protected or full redress will not be afforded without the writ." *Eugster*, 118 Wn. App. At 414 (quoting *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996)). Whether there is a plain, speedy and adequate remedy is a question left to the discretion of the court. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). Generally, whatever can be done without the extraordinary remedy may not be done with it. *Eugster*, 118 Wn. App. At 414.

Petitioners have no other remedy in the ordinary course of law. The 2009 regular legislative session will conclude no later than April 26. ASF ¶ 19. The "ordinary course of law" would not protect petitioners' rights nor provide full redress given the time sensitive nature of this matter. Absent a writ during the legislative session, Petitioners will be denied their rights under the statute to have the request for funding for the FCCP contract considered by the Legislature.

3. Local 925 Is Beneficially Interested.

A party is considered to be beneficially interested and thus has "standing to bring an action for mandamus... if he has an interest in the action beyond that shared in common with other citizens." *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003);

RCW 7.16.170 ("[The writ] must be issued upon affidavit on the application of the party beneficially interested.").

In *Charles*, the court found that retirees, public employees, teachers, as well as two organizations representing retired state employees and teachers, had "an interest, beyond that of other citizens, in changes made to the retirement system" and thus had standing. *Id.* at 620. The *Charles* petitioners sought a writ of mandamus against the Director of Retirement Systems regarding the collection of employer contributions.

Here there can be no serious dispute that Local 925 is "beneficially interested" in a mandamus action to compel the Governor to request funding for its FCCP members' 2009-2011 contract. Local 925 bargained the contract, and took two central economic issues to interest arbitration in order to win improvements for its members. This CBA, if funded, will determine the FCCPs' compensation and working conditions for the 2009-2011 biennium. The Governor's failure to include funding for the providers' contract in her budget deprives the Union and its members of their rights under the Family Child Care Act. Moreover, it will likely deny Local 925's members of the modest but important benefits set forth in Arbitrator Cavanaugh's award.

V. CONCLUSION

For all of the foregoing reasons, Petitioner SEIU Local 925 respectfully asks this Court to issue a writ of mandamus directing Governor Gregoire to immediately withdraw her biennial budget request and replace it with one that includes a request for funding for the FCCP 2009-2011 contract.

Local 925 requests this Court issue the following writ of mandamus:

> Respondent, Governor Gregoire, is hereby ordered to submit within five days of this Order a revised balanced budget to the Legislature that includes funding and the necessary legislative authorization for the 2009-2011 collective bargaining agreement between the State and SEIU Local 925.

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2009, I caused Petitioner's Brief In Support Of Its Petition For A Peremptory Writ Of Mandamus Against Governor Christine Gregoire to be filed with the Washington State Supreme Court via email to Supreme@courts.wa.gov. Per agreement of counsel I caused the same to be served via email and same day US First Class Mail to the following:

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s/ Robert H.Lavitt
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